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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 719

THE COLORADO NATIONAL BANK OF DENVER,
Appellant,

vs.

HOMER F. BEDFORD, AS TREASURER OF THE STATE OF COLORADO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO.

STATEMENT AS TO JURISDICTION.

WALTER W. BLOOD,
FRANK N. BANCROFT,
Counsel for Appellant.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
As to the applicable jurisdictional act of Congress	1
As to the Colorado Statute drawn in question	2
As to the Federal questions being substantial and their presentation	4
Citations believed to sustain jurisdiction	11
Exhibit "A"—Colorado Public Revenue Service Tax Act of 1937	14
Exhibit "B"—Memorandum opinion of the District Court, given upon entering the first judgment or decree, which was later reversed	27
Exhibit "C"—Colorado Supreme Court decision of Affirmance of December 27, 1938	30
Exhibit "D"—Opinion rendered by the Supreme Court of the State of Colorado on April 17, 1939	31
Exhibit "E"—Second declaratory judgment and decree	41
Exhibit "F"—Objections and exceptions of the defendant to the second declaratory judgment and decree, and assignments of error in second cause in Colorado Supreme Court	44
Exhibit "G"—Colorado Supreme Court decision of January 8, 1940	47

Table of Cases Cited.

Ætna Life Insurance Company v. *Haworth*, 300 U. S. 227, 57 Sup. Ct. Rep. 461	5
Bedford, Treasurer, v. *The Colorado National Bank*, 104 Colo. 311, 91 Pac. (2d) 469	10
Clement National Bank v. *Vermont*, 231 U. S. 120, 34 Sup. Ct. Rep. 31	13
Davis v. *Bank*, 161 U. S. 275, 16 Sup. Ct. Rep. 502	13

Page

Easton v. *Iowa*, 188 U. S. 220, 23 Sup. Ct. Rep. 288 13
Federal Land Bank v. *Crosland*, 261 U. S. 374, 43 Sup. Ct. Rep. 385 13
Hinderlider v. *La Plata River, etc., Co.*, 291 U. S. 650, 54 Sup. Ct. Rep. 557 10
McCulloch v. *Maryland*, 4 Wheat. 316 13
Owensboro National Bank v. *Owensboro*, 173 U. S. 664, 19 Sup. Ct. Rep. 537 13
Pittman, Clerk, v. *Home Owners Loan Corp.*, 60 Sup. Ct. Rep. 15 (decided November 6, 1939) 12

STATUTES CITED.

Colorado Declaratory Judgments Act (Colorado Statutes Annotated, 1935, Chapter 93, Sections 78 to 92) 4
Colorado Public Revenue Service Tax Act of 1937 (found in Session Laws of Colorado, 1939, Chapter 158) 2
Judicial Code, Section 237, as amended (28 U. S. C. A. 344) 1, 11
Revised Statutes, Section 5219, as amended (12 U. S. C. A. 548) 7, 12

SUPREME COURT OF THE UNITED STATES

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No. 719

THE COLORADO NATIONAL BANK OF DENVER, A NATIONAL BANKING ASSOCIATION,

Appellant,

vs.

HOMER F. BEDFORD, AS TREASURER OF THE STATE OF COLORADO,

Appellee.

STATEMENT AS TO THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO REVIEW ON APPEAL.

Now comes the appellant above named, and states that the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment, decree, and decision in question, and matters pertinent thereto, are as follows:

I.

As to the Applicable Jurisdictional Act of Congress.

This appeal is brought under the Judicial Code, Section 237 as amended (U. S. C. A. Title 28, Section 344), wherein it

is provided that an appeal may be had to the Supreme Court of the United States from a final judgment or decree in any suit in the highest Court of a State in which a decision in the suit could be had (in this cause the Supreme Court of the State of Colorado), where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution or laws of the United States, and the decision is in favor of its validity.

The appellant firmly believes that the proper method of review in this cause is by an appeal. The case is of great importance, as a test case, for the guidance of the State Treasurer and of all national banks in Colorado. If, therefore, it should be determined that the appeal was improperly sought or allowed under the above Act of Congress, and that the proper method of invoking a review is by a petition for certiorari, then the appellant respectfully and earnestly urges that the papers whereon the appeal was allowed be regarded and acted on as a petition for certiorari.

II.

As to the Colorado Statute Drawn in Question.

The statute of the State of Colorado, the validity of which is involved, is the Colorado Public Revenue Service Tax Act of 1937, now found in Session Laws of Colorado, 1939, Chapter 158, the same being a reenactment, so far as applicable to this cause, of a similar statute of 1937 with the addition of enforcement provisions by distraint. Exhibit A hereto attached, and by this reference made a part hereof, sets out parts of the statute verbatim and appropriately summarizes its other pertinent provisions. Briefly, the said service tax act levies and imposes upon specified services a tax of two per cent of the amount paid for such services, or two per cent of the value thereof. Among the services taxed are "services rendered or performed by any person

engaged in any of the following businesses: * * * banks, finance companies; trust companies and depositories; * * * and any other business of a similar nature in which services (not professional) are performed on a price or fee basis." The act also provides that there shall be exempt from taxation under it "all services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States."

With reference to this exemption provision, the State Treasurer, by his rules, regulations and interpretations, held that the State is prohibited, by Federal authority, from taxing all services performed by national banks (as well as State), and all of their services are, therefore, exempt from taxation, except that safe-deposit services are not a banking function, and so are taxable.

By another provision of the act, the term "taxpayer" is defined to "mean any person obligated to account to the State Treasurer for the tax collected or to be collected or due the State under the terms of the act." By other provisions, also, one rendering or performing taxable services, among other things, is obligated: to procure a license to conduct his business; to make returns and account to the State Treasurer; to charge the user of services for the tax; and himself to pay the tax, less three per cent of its amount, whether or not collected from the user. In addition, fines and penalties, civil and criminal, are provided for defaults and delays; a first and prior lien is imposed upon all of the property of the performer of services, to secure his payment of the tax to the State, whether or not he collects it from the user; and distraint may be had against him as the "taxpayer".

As hereinbefore shown, the appellant bank contended that this statute was invalid against it as to its safe-deposit services unless such services were exempt under the above mentioned exemption provision (as all of its other services

were ruled and conceded to be exempt). But the State court finally concluded otherwise and held that the bank's safe-deposit services are not exempt, and that the statute is valid against the bank "as to the duties, burdens, responsibilities, fines, and penalties imposed upon the bank, in performing the said depository services, to collect and account for, and to pay the said tax."

III.

As to the Federal Questions Being Substantial and Their Presentation.

1. This case was commenced by the State Treasurer against The Colorado National Bank of Denver (and others, but later dismissed as to the others) in the District Court of the City and County of Denver, Colorado. It was brought under the Colorado Declaratory Judgments Act (Colorado Statutes Annotated, 1935, Chapter 93, Sections 78 to 92), which is the so-called "Uniform Declaratory Judgments Law".

The court, as later shown, found that there was an actual (and not a moot) case or controversy admitting of an immediate and definitive determination of the legal rights of the parties, and by its judgment or decree judicially determined those rights, the final adjudication being that the service tax act and the Treasurer's rules, regulations, and interpretations thereof are valid against the bank, and that it is liable to the State for two per cent of its charges on all depository services rendered and to be rendered its customers, whether or not it collects the tax from them, since the effective date of the act (May 15, 1937). Under the Uniform Declaratory Judgments Law, this determination is *res judicata*, and, unless reversed, is binding upon the bank. The adverse proceeding, irrespective of its form, was, therefore, a concrete case and justiciable controversy within the

meaning of those words as used in the United States Constitution and Acts of Congress relating to the jurisdiction of the United States Supreme Court. (See *Ætna Life Insurance Company* v. *Haworth*, 300 U. S. 227, 57 S. Ct. 461.)

2. The amended complaint or petition (Folios 1-18) alleged, among other things, the following:

(a) That the bank is a national bank;

(b) That the State Treasurer had properly promulgated rules, regulations, and interpretations, of which provisions numbered 10 and 27 read:

"10. BANKS. Services rendered or performed by banks were included in the Act. It now appears that the law is invalid as applied to National Banks. Following the general principle of law and taxation now established, to the effect that where a tax statute intended to apply state-wide to all banks, if invalid as to National Banks is invalid as to all State Banks, the service tax is therefore invalid as to all banks, State and National. Provided, however, that where a bank or other similar institution, whose regular services are not subject to the service tax, owns or operates a taxable business or performs taxable services aside from and outside its regular business, such as the operation of safety deposit vaults, hotel, lodging house, real estate brokerage services, etc., such outside services are taxable and the bank must collect and remit the tax thereon."

"27. DEPOSITORIES. Such services rendered as the furnishing of safety vaults by depositories or banks come within the Act, and the tax applies to the charge made therefor" (Folios 7-11).

(c) That the Treasurer had on July 27, 1937, and again on August 27, 1937, demanded of the bank, and it had refused to collect or pay, the said service tax on its safe-deposit services, "or in any manner comply with said law";

(d) That the bank is rendering depository services, taxable under the said law and regulations, which are reasonable, proper, and within the law, and the bank is "responsible and liable for said tax, whether collected from its customers or not, in the manner provided in the said act";

(e) That an actual controversy exists, because of the foregoing, and "the nature of such controversy is that the act in naming banks was, in effect, imposing a tax upon the banks in conflict with the federal laws and hence invalid as to banks" (Folio 14);

(f) That the Treasurer demanded and continues to demand that the bank, "failing and refusing to so collect such tax (meaning the two per cent tax on its safe-deposit services) from its customers, be held responsible and liable therefor in the manner provided, whether collected from its customers or not" (Folio 15).

The petition prayed an adjudication that the bank's safe-deposit services are taxable and that the act is valid as to the bank with respect to the said services, and for other relief.

3. The bank answered (Folios 32-54), alleging among other things:

(a) That it is an agency or instrumentality of the United States;

(b) That it admits the demands, refusals, and controversy above mentioned, arising because the bank is a national bank;

(c) That the bank's safe-deposit business is a part of its banking business; and the answer alleges in detail the facts relating to the incorporation of its vaults in its banking house, taxed with its fixtures as real estate, the bank's operation thereof itself, and not by a subsidiary company,

with the supervision of the Comptroller of the Currency over its operation of that part of its business and his consideration of the pertinent expenses and earnings;

(d) "That under and pursuant to the permission granted by the United States Revised Statutes, Section 5219, as amended (U. S. C. A., Title 12, Section 548), the State of Colorado has by law elected to tax and is taxing the Bank, on its net income, from the period commencing July 1, 1937, and that the said state, and political subdivisions thereof, have taxed and are taxing the Bank's real property to the same extent, according to its value, as other real property is taxed; and that prior to July 1, 1937, the said state, and its political subdivisions, taxed the shares of the said Bank under and pursuant to the first method of taxation granted and permitted by the said Section 5219, as amended";

(e) "That the subject of this action and the matter in controversy is a suit of a civil nature, in equity, and arises under the Constitution or laws of the United States, or both";

(f) That the bank is exempt from taxation under the service tax act because of the provision thereof reading, "all services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States shall be exempt"; and if not exempt, the act is unlawful and unconstitutional, the answer then setting forth the detailed reasons of repugnancy to the Federal Constitution and laws, and especially because: (1) the bank is the "taxpayer", (2) the tax is on its banking business, (3) the bank must procure a license to conduct its business or be guilty of a crime, (4) fines and penalties are imposed upon it, (5) unless the bank makes returns, the State Treasurer may make them and fix the amount of the tax payable by the bank, (6) the act gives the State a first and prior lien on all of the assets of the

bank contrary to Revised Statutes, Section 5242 (U. S. C. A. Title 12, Section 91), and (7) the act makes it criminal for the bank to refuse to pay the tax or to comply with the act from time to time (Folios 43-49);

(g) "That the Bank as a national bank, is a governmental agency or instrumentality of the United States; that the plaintiff in enforcing, or attempting to enforce, the said Service Tax Act as to the Bank, as hereinbefore alleged, is imposing a tax against the Bank in contravention of the constitutional immunity of the United States and their governmental agencies and instrumentalities, and under color of the said Service Tax Act and under color of his rulings, regulations or interpretations with respect thereto is seeking to deprive the Bank of a right, privilege or immunity secured to it by the Constitution of the United States" (Folios 49-50).

(h) That it is discriminatory and improper for the Treasurer to attempt to apply the act to the bank's deposit-services, when he has admitted and conceded that all of its other banking services are exempt from taxation under the act.

And the bank prayed that the court "determine and declare that under and by virtue of the Constitution and laws of the United States * * * all services performed by the bank, including its depository services, are exempt from tax under the Public Service Revenue Tax Act of 1937 of Colorado."

4. The Treasurer demurred (Folio 58) to the above answer, and the parties stipulated (Folios 57-58) that they would stand upon their above pleadings.

5. Both parties, at all times and even prior to the commencement of the suit, had in mind the inherent Federal

questions, both constitutional and statutory. These questions were suggested in the amended petition and were raised in the answer of the defendant, and were the questions determined in each decision rendered in the case thereafter.

6. The District Court heard the demurrer and decided it against the Treasurer, rendering an opinion, a copy of which is hereto attached as Exhibit B, and by this reference made a part hereof. The District Court's formal ruling upon the bank's contentions, quoted from the first decree and judgment, was as follows:

> "That the defendant is a national banking association, organized and existing under and by virtue of the Constitution and the Acts of Congress of the United States of America, and as such is an agency or instrumentality of the United States; that the services performed by the defendant in operating safety deposit boxes and vaults are incident to, and an integral part of, its banking business, for the performance of which it was and is chartered and enfranchised as such governmental agency or instrumentality; that as to any service tax imposed upon the said services under the Colorado Public Revenue Service Tax Act of 1937, the defendant Bank as the one rendering or performing such services would be the taxpayer, or, if not, would be burdened by such a tax; and that, therefore, the said services are by Section 7 of the said Act expressly exempt from taxation under it as 'services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States or the State of Colorado'" (Folios 81-82).

7. As to this judgment and decree in favor of the bank, the State Treasurer procured a review by a writ of error in the Supreme Court of the State of Colorado. The cause on error was first heard by six Justices sitting

en banc, the seventh Justice not participating, and resulted on December 27, 1938, in an order of affirmance because the six Justices were equally divided. A copy of the said decision of December 27, 1938, is hereto attached as Exhibit C, and by this reference made a part hereof. Thereafter, and with the January, 1939 term of the said Supreme Court, a new Justice came on the bench, and a petition for a rehearing by the Treasurer was then granted. Additional arguments were then made and additional briefs filed in due time, and on April 17, 1939, the said Supreme Court handed down its decision and opinion, which has now become final, reversing the District Court and remanding the cause for further proceedings in harmony with its said opinion. In the consideration of the cause on rehearing, one of the Justices who had been in favor of the affirmance of the decision for the bank did not participate, and the new alignment of the court consisted of the three Justices who had been in favor of a reversal and the new Justice who went on the bench at the January, 1939, term deciding for a reversal and the two Justices who had before participated and been for an affirmance dissenting, the other Justices who had been for an affirmance not participating. A copy of this opinion, reported under the title of Bedford, Treasurer, *vs.* The Colorado National Bank, 104 Colo. 311, 91 Pac. (2d) 469, is attached hereto as Exhibit D, and by this reference made a part hereof.

For want of a final judgment (See *Hinderlider* v. *La Plata River, etc., Co.*, 291 U. S. 650, 54 S. C. 557, and cases there cited), no appeal was then sought to the United States Supreme Court, and the case was remanded to the District Court, for further proceedings and the entry of a final judgment.

8. Upon the remand, the Treasurer caused the first declaratory judgment and decree to be vacated, the order over-

ruling his demurrer vacated, his demurrer sustained, and presented the second and final declaratory judgment and decree, a copy of which is hereto attached as Exhibit E, and by this reference made a part hereof (Folios 124-133).

Upon the presentation of the said second judgment and decree, the bank objected and upon its entry excepted, its objections and exceptions being in writing and a copy thereof being attached hereto as Exhibit F, and by this reference made a part hereof (Folios 103-114).

9. The bank thereupon by writ of error procured a review in the Supreme Court of the State of Colorado of this last judgment and decree in the cause in the said court entitled The Colorado National Bank of Denver, a national banking association, Plaintiff in Error, *vs.* Homer F. Bedford, as Treasurer of the State of Colorado, Defendant in Error, and numbered 14684 on the docket of the said Supreme Court: The assignments of error filed in the Colorado Supreme Court and upon which the cause was presented are identical with the objections and exceptions set forth in Exhibit F, and reference is hereby made to them.

10. On January 8, 1940, the Supreme Court of the State of Colorado handed down its decision (not yet reported) in the second cause on error, and a copy thereof is hereto attached as Exhibit G, and by this reference made a part hereof. This decision of January 8, 1940, and the judgment rendered in the Colorado Supreme Court thereon is the last and final judgment and is the judgment from which the bank is prosecuting this appeal.

IV.

Citations Believed to Sustain Jurisdiction.

1. The Judicial Code, Sec. 237, as amended, expressly grants an appeal in this case, because the Colorado Supreme Court held, contrary to the contentions of the appellant

national bank, that the Service Tax Act is valid as against it and applicable to it, even though it is a Governmental agency or instrumentality, and expressly exempted by Congress from State taxation except in the exclusive methods permitted by Rev. Stats. Sec. 5219, as amended.

2. The Colorado Supreme Court held that the Act is valid and that the State may tax the appellant national bank, and subject it to all of the burdens, fines, penalties and liens imposed by the Act, unless it "complies" with the Act. The Court said in this respect: "While the Bank is liable to the State for the tax, the Act itself is so worded that the Bank does not carry any of the tax burden *unless it refuses to comply with certain terms of the Act.* To that extent, as applied to the Bank, it is a 'tax payer' within the meaning of Sec. 2 (e), *supra*, and the liability is a 'tax' within the meaning of Sec. 2 (f), *supra*" (104 Colo. page 320, 91 Pac. (2d) 473. Italics are ours).

There is thus presented the question whether a State may properly tax a national bank otherwise than as provided in Rev. Stats. Sec. 5219, as amended, if the Bank declines to perform certain other statutory duties imposed upon it by the same statute. Involved in this question is the further question of the propriety of a State, by statute, forcing a national bank to involuntarily perform certain services, such as acting as a tax collector, for the State.

The tax liability, seemingly stated by the Colorado Supreme Court as being conditional, is in reality absolute. This follows because, by the other "terms of the Act," and judgment and decree rendered and entered, pursuant to the said opinion, which the Colorado Supreme Court affirmed and approved on January 8, 1940, the Bank is liable and responsible for the tax, and subject to all the provisions of the Act, whether or not it collects the tax from the users of its services.

3. Cases in which the United States Supreme Court has reviewed the validity of State statutes, taxing and otherwise burdening national banks and other Federal agencies and instrumentalities, are numerous. *Among them are:*

M'Culloch v. *Maryland,* 4 Wheat. 316;
Davis v. *Bank,* 161 U. S. 275, 16 Sup. Ct. 502;
Owensboro National Bank v. *Owensboro,* 173 U. S. 664, 19 Sup. Ct. 537;
Easton v. *Iowa,* 188 U. S. 220, 23 Sup. Ct. 288;
Clement National Bank v. *Vermont,* 231 U. S. 120, 34 Sup. Ct. 31;
Federal Land Bank v. *Crosland,* 261 U. S. 374, 43 Sup. Ct. 385;
Pittman, Clerk v. *Home Owners Loan Corporation* (decided Nov. 6, 1939), 60 Sup. Ct. 15.

4. The judgment in this case was entered by the Colorado Supreme Court on January 8, 1940; and petition for appeal is presented to the Chief Justice of the Supreme Court of Colorado, this 17th day of January, 1940.

WALTER W. BLOOD,
FRANK N. BANCROFT,
Counsel for Appellant.

EXHIBIT "A".

Colorado Public Revenue Service Tax Act of 1937.

(S. L. of Colo., 1939, Ch. 158.)

The act re-enacts Chapter 240 Session Laws of Colorado, 1937.

Section 1. It is to be known as "The Public Revenue Service Tax Act of 1937."

"Section 2. *Definitions.* (a) The term 'person' includes any • • • association, corporation," etc.

"(c) The term 'services rendered or performed' shall mean all acts or services rendered, furnished or performed for a valuable consideration by any person engaged in any business or occupation hereinafter designated and defined, when said act or service is rendered, furnished or performed for the ultimate user thereof. The term 'user' shall mean the person for whom or for whose benefit services are rendered or performed.

(d) The term 'business' shall include all activities engaged in or caused to be engaged in with the object of gain, benefit or advantage, direct or indirect.

(e) The term 'taxpayer' shall mean any person obligated to account to the state treasurer for taxes collected or to be collected or due the State under the terms of this Act.

(f) The term 'tax' means either the tax payable by the person procuring or for whose benefit a service is rendered or performed subject to tax, or the aggregate amount of taxes due from the person rendering, performing or furnishing services during the period for which he is required to report his collections, as the context may require.

(g) The term 'value of services' means the price to the user, exclusive of any direct tax imposed by the federal government or by this Act.

(h) The term 'gross taxable services' shall mean the total amount received in money, credits, property or other consideration valued in money from services rendered or performed within this State as herein defined, and embraced within the provisions of this Act; *provided*, that the taxpayer may take credit in his report of gross taxable services

for an amount equal to the value of services rendered or performed when the full value of services thereof is refunded either in cash or by credit and; *provided further,* that on all services rendered or performed, valued in money, when such services are made under conditional contract, or under other contract or agreement where the payment of the principal sum thereunder be extended over a period longer than sixty (60) days from the date of contract or agreement thereof, only such portion of the value of services thereof may be accounted for the purpose of imposition of the tax imposed by this Act as has actually been received in cash by the taxpayer during the period for which the tax imposed by this Act is due and payable; and *provided further,* that taxes paid on gross taxable services represented by accounts found to be worthless and actually charged off for income tax purposes may be credited upon a subsequent payment of the tax herein provided, but if any such accounts are thereafter collected by the taxpayer, a tax shall be paid upon the amounts so collected."

Definitions made in other paragraphs of this section are not pertinent to this cause.

Section 3 exempts from taxation services the cost of which enter into sales of tangible personal property subject to the retail sales tax.

"Section 4. (a) It shall be unlawful for any person to engage in the business of rendering or performing services as the same is defined in this act, after the effective date of this act without first having obtained a license therefor, which license shall be granted and issued by the state treasurer and shall be in force and effect until the thirty-first day of December of the year in which it is issued, unless sooner revoked; except a person who has obtained and who holds a license issued under the provisions of any statute requiring the issuance or securing of a license and a person engaged in the business of rendering or performing services of a professional, technical or scientific nature.

(b) Such license shall be granted or renewed only upon application stating the name and address of the person desiring such a license, the name of such business and the location, including the street number of such business, and such other facts as the state treasurer may require. It shall

be the duty of each such licensee on or before January first of each year, to obtain a renewal thereof if the licensee remain in business or liable to account for the tax herein provided, but nothing herein contained shall be construed to empower the state treasurer to refuse such renewal, except revocation for cause of licensee's prior license. For each license issued hereunder a fee of one dollar ($1.00) shall be paid, which fee shall accompany the application together with an additional fifty cents (50¢) for filing fee. A further fee of one dollar ($1.00) shall be paid for each year or fraction thereof for which said license is renewed, together with an additional fee of fifty cents (50¢) for filing fee; provided that only one-half of said one dollar ($1.00) fee shall be charged on licenses issued after July first of any year."

"(e) The state treasurer may, on a reasonable notice and after full hearing, revoke the license of any person found by the treasurer to have violated any provision of this act. This power to revoke licenses shall extend only to licenses issued by the state treasurer. Any person engaged in the business of rendering or performing services as the same is defined in this act, without having secured a license therefor as herein provided, shall be guilty of a misdemeanor, and shall be punished accordingly."

"(g) No license shall be required for any person engaged exclusively in the business of rendering or performing services which are exempt from taxation under this act.

Section 5. From and after the effective date of this act there is hereby levied and imposed upon the services specified in this act and measured by the amount paid therefor and there shall be collected and paid:

. . . . . .

(c) A tax equivalent to two (2) per cent of the value of services rendered or performed by any person engaging or continuing in any of the following businesses: . . . banks, finance companies; trust companies and depositories; except as to interest on money loaned, stock or commission brokers or agents; and any other business of a similar nature in which services (not professional) are performed on a price or fee basis."

(This section also lists other taxable services not pertinent to the bank's business.)

"Section 6. (a) Every person rendering or performing services shall be liable and responsible for the payment of the entire amount of the said two (2) per cent tax imposed and payable upon his total taxable services rendered or performed, and shall, before the fifteenth day of each month make a return to the state treasurer for the preceding calendar month, and remit all taxes collected and due the state from him, to the state treasurer, less three (3) per cent thereof to cover the expense of the person rendering or performing services in the collection and remittance of said tax. Such return, verified by oath or affirmation of the taxpayer or his duly authorized agent, shall contain such information and be made in such manner and upon such forms as the state treasurer may prescribe and the state treasurer may extend the time for making returns and paying the taxes due under such reasonable rules and regulations as he may prescribe, but no such extension shall be for a greater period than is provided for in subdivision (e) of this section. The burden of proving that any person is exempt from collecting the tax on any services rendered or performed and paying same to the state treasurer, or from making such returns, shall be on the person rendering or performing such services under such reasonable requirements of proof as the state treasurer may prescribe.

(b) Persons rendering or performing services shall, as far as practicable, add the tax imposed under this act, or the average equivalent thereof, to the value of services or charges showing such tax as a separate and distinct item and when added such tax shall constitute a part of such value of service or charge, shall be a debt from the user to the person rendering or performing service until paid, and shall be recoverable at law in the same manner as other debts.

(c) To provide uniform methods of adding the tax, or the average equivalent thereof, to the value of service, it shall be the duty of the state treasurer to formulate and promulgate after hearing appropriate rules and regulations to effectuate the purpose of this section.

(d) It shall be unlawful for any person rendering or performing service to advertise or hold out or state to the public or to any user directly or indirectly, that the tax or any part thereof imposed by this act will be assumed or absorbed by him or that it will not be added to the value of service rendered, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

(e) If the accounting methods regularly employed by the person rendering or performing service in the transaction of his business, or other conditions, are such that reports of services rendered or performed made on a calendar month basis will impose unnecessary hardship, the state treasurer may, upon written request of the person rendering or performing services, accept reports at such intervals as will in his opinion better suit the convenience of the taxpayer and will not jeopardize the collection of the tax. Provided, however, the state treasurer may by rule permit taxpayers whose monthly tax collected is less than twenty dollars ($20.00) to make returns and pay taxes at intervals not greater than every three (3) months.

(f) For the purpose of more efficiently securing the payment, collection and accounting of the taxes provided for under this act, the state treasurer in his discretion, by proper rules and regulations, may provide for the issuance of tokens or other appropriate devices to facilitate collections.

(g) A person doing business in two or more places or locations, taxable hereunder, may file one return covering all such business activities engaged within this state.

(h) If any person shall, during any reporting period, collect as a tax an amount in excess of two (2) per cent of his total services rendered or performed, he shall remit to the state treasurer the full net amount of the tax herein imposed and also such excess; and if any person under the pretense of representation of collecting the tax imposed by this act shall collect during any reporting period an amount in excess of two (2) per cent of his total services rendered or performed the retention of such excess or any part thereof, or the intentional failure to remit punctually to the state treasurer the full amount required to be remitted by

the provisions of this chapter, is declared to be unlawful and shall constitute a misdemeanor.

Section 7. (a) All services rendered or performed, the rendering or performing of which is now subject to an excise tax under the laws of this state, and all services rendered or performed to the United States Government, to the State of Colorado, its departments and institutions, and the political subdivisions thereof in their governmental capacities only and all services rendered or performed to or by religious, charitable, educational and eleemosynary institutions, in the conduct of their regular religious, charitable, educational or eleemosynary functions and all services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States, or the State of Colorado, shall be exempt from taxation under this act; provided that should a dispute arise between the person rendering or performing services and the user or state treasurer as to whether or not any services rendered or performed are exempt from taxation hereunder, nevertheless the person rendering or performing services shall collect and the user shall pay such tax, and the person rendering or performing services shall thereupon issue to the user a receipt or certificate, on forms prescribed by the treasurer, showing the names of the person rendering or performing services and the user, the items of services rendered, the date, the value of services, the amount of tax paid and a brief statement of the claim of exemption. The user thereafter may apply to the state treasurer for a refund of such taxes, and it shall be the duty of the treasurer to determine the question of exemption, subject to review by the courts, as hereinafter provided; provided further, that a refund shall be made, or a credit allowed, for the tax so paid under dispute by any user who has an exemption as in this act provided."

(Then follow provisions for refunds to users and the procedure to procure them.)

Section 8 relates to the State Treasurer's keeping and not divulging the contents of the returns made under the act.

"Section 9. (a) As soon as practicable after the return is filed, the State Treasurer shall examine it; if it then ap-

pears that the correct amount of tax to be remitted is greater or less than that shown in the return to be due, the tax shall be recomputed. If the amount paid exceeds that which is due, the excess shall be refunded or credited against any subsequent remittance from the same persons. If the amount paid is less than the amount due, the difference, together with interest thereon at the rate of one-half of one per cent per month from the time the return was due, shall be paid by the person rendering or performing services within ten (10) days after written notice and demand to him is received from the State Treasurer.

(b) If any part of the deficiency is due to negligence or intentional disregard of authorized rules and regulations with knowledge thereof, but without intent to defraud, there shall be added ten per cent (10%) of the total amount of the deficiency and interest in such case shall be collected at the rate of one (1) per cent per month on the amount of such deficiency from the time the return was due, from the person required to file the return, which interest and addition shall become due and payable ten (10) days after written notice and demand to him by the Treasurer. If any part of the deficiency is due to fraud with the intent to evade the tax, then there shall be added fifty per cent (50%) of the total amount of the deficiency and in such case, the whole amount of the tax unpaid, including the additions, shall become due and payable ten (10) days after written notice and demand by the State Treasurer and an additional one per cent (1%) per month on said amount shall be added from the date the return was due until paid.

(c) For the purpose of ascertaining the correctness of any return, or for the purpose of determining the amount of tax due from any person, the State Treasurer or his duly authorized deputies, may hold investigations and hearings concerning any matters covered by this act and may examine any relevant books, papers, records or memoranda of any such person and may require the attendance of such person or any officer or employee of such person, or of any person having knowledge of such services rendered, and may take testimony and require proof for its information.

The Treasurer and his authorized deputies shall have power to administer oath to such persons."

(The balance of this section relates to the procedure of the State Treasurer in issuing subpoenae, procuring the assistance of the Court to compel the attendance of witnesses, etc.)

"Section 10. It shall be the duty of every person engaging or continuing in business as designated and defined in this act in this state, to keep and preserve suitable records for a period of three years of all services rendered by him and such other books or accounts as may be necessary to determine the amount of tax for the collection of which he is liable under the provisions of this act.

Section 11. (a) The tax imposed by this act shall be a first and prior lien upon the stock of goods and business fixtures of any person rendering or performing services or other person liable for the payment of taxes under this act and shall take precedence over other liens or claims of whatsoever kind or nature, except as to preexisting liens on property not used in performing services as provided herein; * * *.

(b) Whenever the business or property of any taxpayer subject to this act shall be placed in receivership, bankruptcy or assignment for the benefit of creditors, or seized under distraint for property taxes, all taxes, penalties and interest imposed by this act shall be a prior and preferred claim against all the property of said taxpayer, except as to pre-existing liens on property not used in performing services as provided herein, and no sheriff, receiver, assignee, or other officer shall sell such property of any person subject to this act under process or order of any court, without first ascertaining from the State Treasurer the amount of any taxes due and payable under this act, and if there be any such taxes due, owing or unpaid, it shall be the duty of such officer to first pay the amount of said taxes out of the proceeds of said sale before making payment of any moneys to any judgment creditor or other claims of whatsoever kind or nature, except the costs of the proceedings.

Section 12. (a) All sums of money paid by the user to the person rendering or performing services as taxes imposed by this chapter shall be and remain public money the property of the State of Colorado, in the hands of such person rendering or performing services and he shall hold the same in trust for the sole use and benefit of the State of Colorado until paid to the State Treasurer, as herein provided, and for failure to so pay to the State Treasurer, such person rendering or performing services shall be punished as provided by law.

(b). If a person neglects or refuses to make a return in payment of the tax as required by this act, the State Treasurer shall make an estimate, based upon such information as may be available, of the amount of taxes due for the period or periods for which the taxpayer is delinquent; and upon the basis of such estimated amount, compute and assess in addition thereto, a penalty equal to ten per cent (10%) thereof, together with interest on such delinquent taxes at the rate of one per cent (1%) per month from the date when due. Promptly thereafter, the State Treasurer shall give to the delinquent taxpayer written notice of such estimated taxes, penalty and interest, which notice must be served personally or by registered mail. Such estimate shall thereupon become an assessment, and such assessment shall be final and due and payable from the taxpayer to the State Treasurer ten (10) days from the date of service of the notice or the date of mailing by registered mail; . . .

(c) If any taxes, penalty or interest imposed by this act and shown due by returns filed by the taxpayer or as shown by assessments duly made as provided herein, are not paid within five (5) days after the same are due, the State Treasurer may issue a notice, setting forth the name of the taxpayer, the amount of the tax, penalties and interest, the date of the accrual thereof, and that the State of Colorado claims a first and prior lien therefor on the real and tangible personal property of the taxpayer except as to pre-existing liens on property not used in performing services as provided herein. Said notice shall be on forms prepared by the State Treasurer, and shall be verified by him or his

duly qualified deputy, or any duly qualified agent of the State Treasurer, whose duties are the collection of such tax, and may be filed in the office of the clerk and recorder of any county in the state in which the taxpayer owns real or tangible personal property, and the filing of such notice shall create such lien on such property in that county and constitute notice thereof. After said notice has been filed, or concurrently therewith, or at any time when taxes due are unpaid, whether such notice be filed or not, State Treasurer may issue a warrant under the official seal of the Treasurer of the State of Colorado directed to any duly authorized revenue collector, or to the sheriff of any county of the state, commanding him to levy upon, seize and sell sufficient of the real and personal property of the tax debtor found within his county for the payment of the amount due, together with interest, penalties and costs, as now or hereafter may be provided by law.

(d) Such revenue collector or the sheriff shall forthwith levy upon sufficient of the property of the taxpayer and said property so levied upon shall be sold in all respects with like effect and in the same manner as is prescribed by law in respect to executions against property upon judgment of a court of record, and the remedies of garnishments shall apply. The sheriff shall be entitled to such fees in executing such warrant, as are now allowed by law for similar services."

(e) This paragraph provides for the release of the lien when the delinquent taxes are paid.

(f) This paragraph provides that it is the duty of county clerks to record the above notices.

"(g) The State Treasurer may also treat any such taxes, penalties or interest due and unpaid as a debt due the state from the vendor. In case of failure to pay the tax, any portion thereof, or any penalty or interest thereon when due, the State Treasurer may recover at law the amount of such taxes, penalties and interest in such justice, county or district court of the county wherein the taxpayer resides or has his principal place of business having jurisdiction of the

amounts sought to be collected. The return of the Taxpayer or the assessment made by the State Treasurer, as herein provided, shall be 'prima facie' proof of the amount due. Such actions may be actions in attachment, and writs of attachment may be issued to the constable or sheriff as the case may be and in any such proceeding no bond shall be required of the State Treasurer, nor shall any constable or sheriff require of the State Treasurer an indemnifying bond for executing the writ of attachment, or writ of execution upon any judgment entered in such proceedings; and the State Treasurer may prosecute appeals or writs of error in such cases without the necessity of providing bond therefor. It shall be the duty of the Attorney General or any district attorney when requested by the State Treasurer, to commence action for the recovery of taxes due under this act, and this remedy shall be in addition to all other existing remedies or remedies provided in this act, and the provisions of this section and Section 11 shall apply to taxes now due, as well as those becoming due hereafter. The State Treasurer may, for good cause shown, waive any penalty *impared* by this act. A penalty shall be deemed any charge in excess of six (6) percent interest per annum.

Section 13 provides for hearings before the State Treasurer of persons feeling aggrieved.

"Section 14. (a) Every decision of the State Treasurer shall be in writing and notice thereof shall be mailed to the person rendering or performing services within ten (10) days, and all such decisions shall became final upon the expiration of thirty (30) days after notice of such decision shall have been mailed to the person rendering or performing services, unless proceedings are taken within said time for review thereof as hereinafter provided."

Subsequent paragraphs of this section provide for reviews in the District Court of decisions of the State Treasurer.

Section 15 relates to the notices to be given by the State Treasurer.

"Section 16. The license and tax imposed by this act shall be in addition to all other licenses and taxes imposed by law, except as herein otherwise provided."

Section 17. It shall be unlawful for any person rendering or performing services to refuse to make any return provided to be made in this act or to make any false or fraudulent return or false statement on any return or fail and refuse to make payment to the State Treasurer of any taxes collected or due the state, or in any manner evade the collection and payment of the tax, or any part thereof, imposed by this act, or for any person to fail or refuse to pay such tax, or evade the payment thereof, or to aid or abet another in any attempt to evade the payment of the tax imposed by this act. Any person violating any of the provisions of this section shall be guilty of a misdemeanor. Any corporation making a false return or a return containing a false statement as aforesaid, shall be guilty of a misdemeanor. Any court of competent jurisdiction, including the justice court, of the county in which the offender resides, or, if a corporation, then the county of its principal place of business, shall have jurisdiction to enforce this section.

In addition to the penalties, provided by this act, any person who shall knowingly and willfully swear to or verify any false statement shall be guilty of the offense of perjury and on conviction thereof shall be punished in the manner provided by law.

Section 18. Any person guilty of a misdemeanor, as defined and declared in this act, upon conviction, shall be punished by a fine of not exceeding One Thousand ($1,000.00), or by imprisonment not exceeding six (6) months in the county jail, or both such fine and imprisonment.

Section 19. The administration of this act is vested in and shall be exercised by the State Treasurer who shall administer this act by means of or through the department or agency now or hereafter designated or established for the purposes of collecting the excise taxes provided by and enforcing the provisions of the 'emergency retail sales tax

act of 1935'. The State Treasurer shall prescribe forms and reasonable rules and regulations in conformity with this act for the making of rules and for the ascertainment, assessment, and collection of the taxes imposed hereunder and for the proper administration and enforcement of this act. General and special rules may be adopted, amended, or rescinded by the State Treasurer only after public hearing or trial to be heard thereon, of which proper notice has been given. General rules shall become effective ten (10) days after filing with the Secretary of State and publication in one or more newspapers of general circulation in this state. Special rules shall become effective ten (10) days after notification to or mailing to the last known address of the individual or concerns affected thereby. Regulations may be adopted, amended, or rescinded by the State Treasurer and shall become effective in the manner and at the time prescribed by the State Treasurer. The State Treasurer shall cause to be printed for distribution to the public the general rules and regulations as herein provided."

Section 20 relates to the use to be made by the State Treasurer of the funds collected under the tax.

Section 21 continues in force penalties, liabilities, etc. incurred under former statutes relating to an excise tax on services.

"Section 22. If any section, subsection, sentence, clause or phrase of this act is, for any reason, held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The General Assembly hereby declares that it would have passed this act, and each section, subsection, sentence, clause or phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid or unconstitutional."

The balance of the sections relate to the effective date of the act.

EXHIBIT "B".

Memorandum Opinion of the District Court, Given Upon Entering the First Judgment or Decree, Which Was Later Reversed.

Homer F. Bedford as Treasurer of Colorado seeks a judgment declaring that the services rendered by Colorado National Bank in maintaining safety deposit boxes and vaults for use for hire by the public are taxable under Colorado Service Tax law of 1937. The Bank claims such services are exempt from taxation. The matter is before the Court on the plaintiff's demurrer to defendant's answer.

The Colorado Service Tax law imposes a tax on services rendered, makes the person performing the services personally liable to the state for all taxes paid by those receiving the services and also personally liable to the state for all taxes due for services rendered, whether they are collected or not. The Act defines the term "taxpayer" as the person obligated to account to the state for taxes collected or to be collected or due the state. Persons performing taxable services are required by the Act to procure a license from the state and to make monthly reports to the state treasurer. The tax imposed by the Act is made a lien upon the goods and property of the person performing the services.

In the detailed list of businesses in connection with which services are taxed under the Act appears the following: "banks, finance companies, trust companies and depositories," and plaintiff contends that this language authorizes the state in demanding that plaintiff account to the state for depository services rendered, in accordance with the Act. Section 7 of the act provides, inter alia, that "all services rendered or performed which the State of Colorado is prohibited from taxing under the Constitution or laws of the United States, or the State of Colorado, shall be exempt from taxation under this Act," and the Bank's claim of exemption is based upon this provision. The Bank claims that the service tax law makes the performer of the services the taxpayer, and that such form of taxation is prohibited by Act of Congress (U. S. Code Annotated, Title 12, Sec. 548), reading in part as follows:

"The legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several states may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any state of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause."

It is admitted that the State of Colorado taxes national banks on their income. The state admits that if the service tax law imposes the tax on the bank, that the exemption applies, but asserts that under our statutes the person performing the services is merely an agent of the state for collecting the tax, and consequently the real taxpayer is the recipient or the purchaser of the services. Cases are cited by both sides from other states interpreting tax laws similar to the one here being scrutinized. In the recent case of Rinn *v.* Bedford, not yet reported, our Supreme Court held the service tax law constitutional and denominated the tax imposed an excise tax. While the question of who is the taxpayer was not directly involved in that case, the opinion refers to the "tax imposed upon attorneys at law." The Court was referring to taxes upon services rendered by attorneys and not to services rendered to attorneys by others. The California sales tax law imposes the tax on retailers as a tax on the privilege of doing business, and has been upheld as a valid excise tax. The Kentucky sales tax law by its terms makes the retailer the taxpayer, but the courts of that state interpreted it as a tax on the consumer or buyer. (City of Covington *v.* Tax Commission, 77 S. W. (2d) 386.) The Court in that case cited Pierce Oil Co. *v.* Hopkins, 282 Fed. 253, a case from Arkansas, which held that a gasoline tax law requiring dealers to collect one cent a gallon for each gallon of gasoline sold, imposed a tax on the seller, and the

Kentucky Court distinguishes the Pierce case because the Arkansas Statute imposed upon the seller a personal obligation to pay the levied tax whether he collected it from the purchaser or not. The Court in the Pierce Oil Co. case said:

"It is doubtless true that the amount of the tax usually does fall finally upon the purchaser because the seller will naturally fix a price or an amount to be collected for the commodities sold which will include the amount of tax. * * * The seller is required to register and to file a report of his sales and show therein 'the amount of tax due by said seller.' The seller must pay the tax unless he collects the amount from the purchaser. * * * The penalties provided in the act are all levelled against the seller."

The Colorado Act makes the seller of the services personally liable to the state and prescribes severe penalties to be enforced against the seller.

In Panhandle Oil Co. *v.* Mississippi, 277 U. S. 218, 72 L. Ed. 857, the Court held the United States not liable to pay a gasoline tax. The Mississippi law required persons engaged in selling gasoline to pay one cent per gallon of gasoline sold for the privilege of engaging in the business. The retailer was the taxpayer. The Court said:

"The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States of its constitutional powers to operate the fleet and hospital."

The answer of defendant alleges facts, admitted by the demurrer, from which the conclusion must follow that the defendant is a governmental agency or instrumentality, and that the services performed by it in operating depositories are an incident to and integral part of its banking business. Considering the provisions of the Service Tax Act, it seems certain that as to services rendered by the Bank for which it does not collect the tax, the Bank is the taxpayer. The state looks only to the Bank to receive the amount of the tax, whether collected or not. The Act is so drawn that it makes no distinction, so far as liability of those performing services is concerned, between taxes collected by the Bank from its customers and taxes due the state that are not collected.

Even though, strictly speaking, the Bank may be only the agent of the state and a trustee as to money in its hands collected as taxes from the purchasers of the services, still the Act imposes upon it burdens with reference to taxes which it must discharge for the privilege of doing business and performing the services.

The burdens imposed upon the Bank by the Act, in my judgment, constitute an interference with the proper functions of a governmental agency and impair the efficiency of the Bank to discharge the duties for the performance of which it was created.

The demurrer to the answer is overruled.

It is the judgment and declaration of the Court that the services performed by defendant in operating safety deposit boxes and vaults are exempt from taxation under the service tax law of Colorado.

Plaintiff's exceptions are noted. Stay of execution for thirty (30) days is allowed, and plaintiff may have time and until sixty (60) days within which to prepare, tender and have settled a bill of exceptions.

Motion for new trial is dispensed with.

Done and signed in open court this 9th day of June, A. D. 1938.

By the Court:

ROBERT W. STEELE,
Judge.

EXHIBIT "C".

Colorado Supreme Court Decision of Affirmance of December 27, 1938.

Mr. Justice Holland does not participate in the consideration of this cause. Mr. Chief Justice Burke, Mr. Justice Bouck and Mr. Justice Knous think the judgment should be affirmed, while Mr. Justice Hilliard, Mr. Justice Young and Mr. Justice Bakke think it should be reversed. The court being "equally divided in opinion, the judgment

of the court below shall stand affirmed." Code of Civil Procedure Sec. 439.

EXHIBIT "D".

Opinion Rendered by the Supreme Court of the State of Colorado on April 17, 1939 (104 Colo. 311, 91 Pac. (2d) 469).

Mr. Justice Bock delivered the opinion of the court.

This action was brought by plaintiff in error under the Uniform Declaratory Judgments Act, '35 C. S. A., chapter 93, sections 78-92, to obtain a judicial declaration that the state has the power to compel national banks to collect and remit service taxes upon depository services performed by such banks to the public, in compliance with the Public Revenue Service Tax Act of 1937 (S. L. '37, c. 240).

Upon the filing of an amended petition defendant in error answered, to which answer plaintiff in error demurred. The demurrer was overruled. It was previously agreed that the party against whom the ruling on demurrer was made would stand upon such ruling. Plaintiff in error made that election and the court decreed, "That all services performed by defendant in operating safety deposit boxes and vaults are exempt from taxation" under the Public Revenue Service Tax Act, *supra*. Reversal of that decree is sought here, and the assignment of errors, in substance, raise two questions, namely: (1) Upon whom is the service tax imposed, the party rendering the service or the one who uses it? (2) Does the requirement to collect and remit the tax upon depository service constitute a burden upon, or an interference with, the proper functions of a national bank as a governmental agency?

Reference will hereinafter be made to plaintiff in error as treasurer and to defendant in error as the bank.

(1) It may be conceded that if the bank is the party upon which the tax is solely imposed, then the act as to national banks would be contrary to the federal statutes (U. S. Revised Statutes, section 5219, U. S. C. A. Title 12, section 548), and invalid. The pertinent provisions are:

"The legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several states may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any state of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause."

This section was intended to protect capital invested in national banks from unfriendly discrimination by the states in the exercise of the taxing power. *Adams* v. *Nashville* (Tenn. 1877), 95 U. S. 19, 30, 24 L. Ed. 369; *Mercantile National Bank* v. *City of New York* (C. C. N. Y. 1886), 28 F. 776 (affirmed 1887), 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895; *Roberts* v. *American National Bank of Pensacola* (1929), 97 Fla. 411, 121 So. 554; *Des Moines National Bank* v. *Fairweather* (Iowa, 1923), 263 U. S. 103, 106, 44 Sup. Ct. 23, 68 L. Ed. 191; *Minnehaha National Bank* v. *Anderson* (Dist. Ct., S. D. 1924), 2 F. (2d) 897.

(2) It heretofore has been determined that a state can only tax a national bank with the consent of Congress and not otherwise. *First National Bank v. Anderson*, 269 U. S. 341, 46 Sup. Ct. 135, 70 L. Ed. 295, and numerous other authorities. Section 5219, *supra*, furnishes the exclusive authority governing state taxation as to national banks. *Bank of California v. Richardson*, 248 U. S. 476, 39 Sup. Ct. 165, 63 L. Ed. 372.

Whether this principle of implied constitutional immunity from the taxation of national banks has been modified, when a nondiscriminatory tax is levied on the safety deposit box service performed by such banks, by recent opinions of the Supreme Court of the United States in *Graves* v. *People ex rel.*, 59 Sup. Ct. 595, 83 L. Ed. 577, and in *State Tax Commission* v. *Van Cott*, 59 Sup. Ct. 605, 83 L. Ed. 588, is not

necessary for us to determine. According to the views therein expressed, the trend is definitely to narrow implied constitutional intergovernmental immunity.

(3) Before discussing the assignment of errors, we direct our attention to section 4 (a) of our service tax act, which provides, in effect, that a bank must procure a license to conduct a safety deposit box business, and conducting such a business without procuring the necessary license constitutes a misdemeanor. Excepted from this provision are persons who hold licenses under any other statute and those performing services of a professional, technical or scientific nature. It is conceded that the bank is authorized under its federal charter to do a safety deposit box business. The state, therefore, cannot require it to take out this license or collect the fee therefor from the bank. *Bank of California* v. *Portland*, 157 Ore. 203, 69 P. (2d) 273, 275; *Austin* v. *Seattle*, 176 Wash. 654, 30 P. (2d) 646; *City of Shelbyville* v. *Citizens Bank of Shelbyville*, 114 S. W. (2d) 719. Section 4 (a) *supra*, does not contemplate the licensing or collection of the fee therefor from all persons performing and collecting taxable services under the act. In so far as this section is concerned, if applied to national banks, it would, under the above authorities, be invalid. No attempt is made in the instant case to enforce it. In fact, the treasurer says that no license fees are demanded from the bank. The validity of this section of the act, however, does not affect other portions thereof as applied to the bank. Section 22 declares it as the legislative intent that it would have passed the act irrespective of the fact that any one or more sections be declared invalid. It may be assumed, therefore, that the bank is not required to comply with Section 4-(a) of the act.

(4) Our first concern under the assignment of errors is whether the service tax involved here is imposed upon the bank and whether it bears this tax burden. We think not.

In our determination of this question it is necessary that we quote certain pertinent portions of the act, as follows:

"Section 2. (c) The term 'services rendered or performed' shall mean all acts or services rendered, furnished or performed for a valuable consideration by any person engaged in any business or occupation hereinafter desig-

nated and defined, when said act or service is rendered, *furnished or performed for the ultimate user thereof. The term 'user' shall mean the person for whom or for whose benefit services are rendered or performed.*

* * * * * * *

"(e) The term 'taxpayer' shall mean any person obligated to account to the state treasurer for taxes collected or to be collected or due the state under the terms of this act.

"(f) The term 'tax' means *either the tax payable by the person procuring or for whose benefit a service is rendered or performed subject to tax,* or the aggregate amount of taxes due from the person rendering, performing or furnishing services during the period for which he is required to report his collections, as the context may require.

"(h) * * * taxes paid on gross taxable services represented by accounts found to be worthless and actually charged off for income tax purposes may be credited upon a subsequent payment of the tax herein provided, but if any such accounts are thereafter collected by the taxpayer, a tax shall be paid upon the amount so collected.

"Section 5. From and after the effective date of this act there is hereby *levied and imposed upon the services specified in this act and measured by the amount paid* therefor and there shall be collected and paid:

(c) A tax equivalent to two (2) per cent of the value of services rendered or performed by any person engaging or continuing in any of the following businesses: * * * banks, finance companies, trust companies and depositories, * * *.

"Section 6. Every person rendering or performing services shall be liable and responsible for the payment of the entire amount of the said two (2) per cent tax imposed and payable upon his total taxable services rendered or performed, and shall before the fifteenth day of each month make a return to the state treasurer for the preceding calendar month, and remit all taxes collected and due the state from him, to the state treasurer, *less three (3) per cent thereof to cover the expense of the person rendering or*

performing services in the collection and remittance of said tax. * * *

"(b) Persons rendering or performing services shall, as far as practicable, add the tax imposed under this act, or the average equivalent thereof, to the value of services or charges showing such tax as a separate and distinct item and when added such tax shall constitute a part of such value of service or charge, shall be a debt from the user to the person rendering or performing service until paid, and shall be recoverable at law in the same manner as other debts.

* * * * * * * *

"(d) It shall be unlawful for any person rendering or performing service to advertise or hold out or state to the public or to any user, directly or indirectly, *that the tax or any part thereof imposed by this act will be assumed or absorbed by him* or that it will not be added to the value of service rendered, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

"Section 7. All services rendered or performed, the rendering or performing of which is now subject to an excise tax under the laws of this state, and all services rendered or performed to the United States government, to the state of Colorado, its departments and institutions, and the political subdivisions thereof in their governmental capacities only and all services rendered or performed to religious, charitable and eleemosynary corporations, in the conduct of the regular religious, charitable or eleemosynary functions and activities and all services rendered or performed to or by educational institutions, directly under the supervision and control of a religious sect or denomination in the conduct of the regular educational functions and activities, and all *services rendered or performed which the state of Colorado is prohibited from taxing under the Constitution or laws of the United States*, or the state of Colorado, *shall be exempt from taxation under this act;* provided that should a dispute arise between the person rendering or performing services and the user or state treasurer as to

whether or not any services rendered or performed i exempt from taxation hereunder, nevertheless the perso rendering or performing services shall collect and the use shall pay such tax, and the person rendering or perform ing services shall thereupon issue to the user a receipt o certificate on forms prescribed by the treasurer, showing the names of the person rendering or performing services and the user, the items of services rendered, the date, the value of services, the amount of tax paid and a brief statement of the claim of exemption. The user thereafter may apply to the state treasurer for a refund of such taxes, and it shall be the duty of the treasurer to determine the question of exemption, subject to review by the courts, as hereinafter provided; provided further that a refund shall be made, or a credit allowed, for the tax so paid under dispute by any user who has an exemption as in this act provided. Such refund shall be made by the state treasurer after compliance with the follow ng conditions precedent:

"Applications for refund must be made within sixty (60) days after the rendering or performance of services whereon an exemption is claimed and must be supported by the affidavit of the user accompanied by the original paid invoice, receipt and certificate issued by the person rendering or performing services, and be made upon such forms as shall be prescribed and furnished by the state treasurer, which forms shall contain such information as said state treasurer shall prescribe. Upon receipt of such application the treasurer shall examine same with all due speed and shall give notice to the applicant by order in writing of his decision thereon. Aggrieved applicants may, within ten (10) days after such decision is mailed to them, petition the treasurer for a hearing on the claim in the manner provided in this act. The right of any person to a refund under this article shall not be assignable and such application for refund must be made by the same person who paid the tax thereon as shown in the invoice, receipt or certificate.

"Section 12. All sums of money paid by the user to the person rendering or performing services as taxes imposed by this act shall be and remain public money, the property of the state of Colorado, in the hands of such person ren-

dering or performing services and he *shall hold the same in trust for the sole use and benefit of the state of Colorado until* paid to the state treasurer as herein provided, and for failure to so pay to the state treasurer, such person rendering or performing services may be punished, as provided by law." (all italics ours).

The legislative intent seems to be clear, i. e., to impose a tax upon the user of the service. The Levy is "imposed upon the services specified in this act." In holding that this is a tax upon the user, we are fortified by a number of authorities construing similar acts. In fact, the great weight of authority is definitely in that direction. *Breaux Ballard* v. *Shannon*, 271 Ky. 553, 112 S.W. (2d) 996; *Covington* v. *Tax Commission*, 257 Ky. 84, 77 S.W. (2d) 386; *Wiseman* v. *Phillips*, 191 Ark. 63, 84 S.W. (2d) 91; *Morrow* v. *Henneford*, 182 Wash. 625, 47 P. (2d) 1016; *School District* v. *Smith* (Mo.), 111 S.W. (2d) 167; *Long* v. *Roberts & Son*, 234 Ala. 570, 176 So. 213.

In construing a similar act (Sales Tax Act, chapter 144, '35 C. S. A.), we have recently held that the sales tax involved is not imposed upon the dealer; that he is merely the state's agent to collect and he is compensated for that service. *Bedford* v. *Hartman Brothers, Inc.*, 104 Colo. 190, 89 P. (2d) 584.

In the instant case the direct tax burden is not upon the bank. It is the state's agent to collect and it is compensated for that service. The tax when collected by the bank is the property of the state, which it holds in trust for the sole use and benefit of the state until paid to the treasurer as provided by law. While the bank is liable to the state for the tax, the act itself is so worded that the bank does not carry any of the tax burden unless it refuses to comply with certain terms of the act. To that extent, as applied to the bank, it is a "taxpayer" within the meaning of section 2 (e), *supra*, and the liability is a "tax" within the meaning of section 2 (f), *supra*.

(5, 6) The second question under the assignment of errors requires us to answer whether the duties imposed upon national banks by the terms of the act, requiring them to

collect and remit the tax upon their safety deposit box service, constitutes a burden upon or an interference with the proper functions of a national bank as a governmental agency. This also involves the exemption in section 7, *supra*, upon which the bank relies, That a national bank is a governmental agency and therefore an instrumentality through which the government performs certain fiscal functions cannot be questioned. *M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. Ed. 579. The national bank system was devised, primarily, to provide a national currency, secured by a pledge of United States bonds, and they are agencies or instruments of the government for that purpose. *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 16 Sup. Ct. 502, 40 L. Ed. 700. Their powers are defined and limited by the acts of Congress. *Federal Intermediate Credit Bank* v. *L'Herisson*, 33 F. (2d) 841.

(7, 8) There is no congressional requirement that a national bank conduct a safety deposit box service. The relationship created under such service is that of bailor and bailee and not that of debtor and creditor. *Tuckerman* v. *Mearns*, 262 Fed. 607. A depository service rendered by a national bank is purely incidental to and not a necessary incident to its banking business.

(9) Under Title 12, U. S. C. A., section 24, it is provided, "That in carrying on the business commonly known as the safe-deposit business the association shall not invest in the capital stock of a corporation organized under the law of any state to conduct a safe-deposit business in an amount in excess of 15 per centum of the capital stock of the association actually paid in and unimpaired and 15 per centum of its unimpaired surplus." This would indicate that a national bank may conduct a safety doposit box business under a separate state organization, with limitations.

Section 5228, United States Revised Statutes, Title 12, U. S. C. A., Section 133, prohibits national banks from continuing business after notice by the comptroller of default, "except to receive and safely keep money belonging to it, and to deliver special deposits." *National Bank* v. *Graham*, 100 U. S. 699, 25 L. Ed. 750. From this it may be inferred

that safety deposit box service is clearly separable from the banking business as a governmental instrumentality under the federal law.

Counsel for plaintiff in error place great reliance upon the case of *Bank of California* v. *Portland, supra.* That case involved only authority of the city to require a license and payment of a fee therefor by banks conducting a business of "Safe-deposit vault." Much said in that case concerning the power of national banks to conduct safety deposit vaults is merely *obiter dicta.* We already have indicated that we are not here concerned with the imposition of license fees on banks which conduct a safety deposit box business. We are in agreement with the conclusions announced in the *Portland* case.

(10) That the tax involved in the instant case is non-discriminatory cannot be questioned. It applies to all banks, state and national, and to any person conducting a safety deposit box business, independent of banking operations. We do not disagree with cases which hold that the receiving of special deposits is a power incidental to the business of banking. What we do say is, that it is not a necessary power to the conduct of a banking business, the absence of which would prevent the bank from discharging its duties to the government. In other words, there is nothing in the service tax act that would burden the bank, as a governmental instrumentality, in conducting its banking business. *In re Leavy,* 85 F. (2d) 25. How, we may ask, do the requirements of the service tax act interfere with any powers of the bank or burden its governmental activities? Every law, state or national, controlling banks, implies a restraint, but is the restraint involved here such a burden upon national banks as would impair their operations as governmental agencies?

In McClellan v. *Chipman,* 164 U. S. 347, 17 Sup. Ct. 85, 41 L. Ed. 461, Mr. Justice White, commenting upon the relationship between state and federal laws, as applied to national banks, quotes from *National Bank* v. *Commonwealth,* 9 Wall. 353, 362, as follows: "National banks 'are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state

than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.'"

There is nothing in the service tax act which incapacitates the bank from discharging its duties to the government. That, after all, is the test: whether there is any unconstitutional interference with the operations of, or burden imposed upon, the bank by the applicable provisions of the act.

Mr. Chief Justice Hughes, in the recent case of *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 82 L. Ed. 155, 58 Sup. Ct. 208, discusses the validity of a state income tax imposed by the state of West Virginia upon the gross receipts of the Dravo Company under contracts with the United States, as follows:

"Second. Is the tax invalid upon the ground that it lays a direct burden upon the federal government? The Solicitor General, speaking for the government, supports the contention of the state that the tax is valid. Respondent urges the contrary.

"The tax is not laid upon the government, its property or officers. *Dobbins* v. *Commissioners*, 16 Pet. 435, 449, 450.

"The tax is not laid upon an instrumentality of the government (citing cases). Respondent is an independent contractor. The tax is nondiscriminatory.

"The tax is not laid upon the contract of the government (citing cases). The application of the principle which denies validity to such a tax has required the observing of close distinctions in order to maintain the essential freedom of government in performing its functions, without unduly limiting the taxing power which is equally essential to both nation and state under our dual system."

Mere operation of safety deposit vaults by a national bank does not, in itself, involve a governmental relation with the federal government. In fact, recent federal authorities give basis for the belief that even if the service tax were

imposed upon the bank, under the circumstances in the instant case, it would not be an interference with any instrumentality of the government and would be valid. It is not necessary for us to, and we do not, pass upon that question.

Counsel for the bank argue that the creation of a first and prior lien upon it (see section 11, Service Act) in the event of its failure to collect and pay, imposes a direct burden upon it as a federal instrumentality. Whether or not this contention is well founded is not an issue in the instant case. We leave that question open. The act is enforceable without the creation of this lien as applied to a national bank.

(11) We conclude, that the tax created by the service tax act is imposed, not upon the bank, but upon the user of the service, and that the requirement that the bank collect and pay the same to the treasurer, under the circumstances detailed in the act, is not an unconstitutional burden upon, nor does it unlawfully interfere with, the bank as a governmental instrumentality. The constitutional immunity claimed by the bank does not apply.

In view of our conclusion, we do not discuss other questions raised.

The judgment is reversed and the cause remanded, with instructions to sustain the demurrer to the answer of the bank, and for further proceedings according to law.

Mr. Justice Burke and Mr. Justice Knous dissent.

Mr. Justice Francis E. Bouck not participating.

EXHIBIT "E".

Second Declaratory Judgment and Decree.

This cause coming on to be heard, upon its merits, upon plaintiff's amended petition for declaratory judgment and his amendment to paragraph VII thereof, upon the defendant's answer thereto, upon plaintiff's demurrer to the said answer, upon the sustaining of the said demurrer, upon the stipulation of the parties to stand on the ruling on the demurrer to defendant's answer, dated and filed herein on

May 9, 1938, and also upon the remittitur from the Supreme Court of the State of Colorado, in the cause therein entitled "Homer F. Bedford, as Treasurer, of the State of Colorado, Plaintiff in Error v. The Colorado National Bank, a Banking Corporation, Defendant in Error," and numbered 14405, and the opinion rendered in the said cause on April 17, 1939, reversing the order overruling the demurrer to the answer and reversing the judgment entered accordingly; and plaintiff appearing by his attorneys, Byron G. Rogers, Attorney General, and Elmer P. Cogburn, Assistant Attorney General, and the defendant appearing by its attorneys, Walter W. Blood, and Bartels, Blood and Bancroft; and the Court having fully considered all of the foregoing and being now sufficiently advised in the premises;

The Court Doth Find and Conclude as a Matter of Law:

That the defendant is a national banking association organized and existing under and by virtue of the Acts of Congress of the United States of America, and as such is an agency or instrumentality of the United States; that the services performed by the defendant in operating safety deposit boxes and vaults do not involve any governmental relation with the United States; that the service tax imposed by the Colorado Public Revenue Service Tax Act of 1937 (S. L. of Colo. 1937, Ch. 240, as readopted, extended and amended by House Bill No. 352, adopted by the General Assembly of the State of Colorado and approved May 1, 1939), as applied to the depository services performed by the defendant Bank, is not an unlawful interference with an instrumentality of the United States; that the following quoted paragraphs or sections numbered 10 and 27 of the rules, regulations and interpretations, prescribed and published pursuant to the said Act by the plaintiff on or about June 10, 1937, and republished, as amended, on October 22, 1937, with respect to depository services performed by the defendant Bank, are proper and valid:

"10. Banks. Services rendered or performed by Banks were included in the Act. It now appears that the law is invalid as applied to National Banks.

Following the general principle of law and taxation now established, to the effect that where a tax statute, intended to apply statewide to all banks, if invalid as to National Banks is invalid as to all State Banks, the service tax is therefore invalid as to all banks, State and National. Provided, however, that where a bank or other similar institution, whose regular services are not subject to the service tax, owns or operates a taxable business or performs taxable services aside from and outside its regular business, such as the operation of safety deposit vaults, hotel, lodging house, real estate brokerage services, etc., such outside services are taxable and the bank must collect and remit the tax thereon."

"27. Depositories. Such services rendered as the furnishing of safety vaults by depositories or banks come within the Act, and the tax applies to the charge made therefor." That the said depository services performed by the defendant Bank are not exempt from the application of the said Act under the provisions of Section 7 thereof; that the tax created by the Service Tax Act is imposed, not upon the Bank, but upon the user of the service, and does not violate U. S. Revised Statutes, Section 5219; U. S. C. A. Title 12, Section 548; and that the requirement that the Bank collect and pay the same to the State Treasurer, in the manner provided in the Act, is not an unconstitutional burden upon, nor does it unlawfully interfere with, the Bank as a governmental instrumentality; and accordingly, the Court should now order, adjudge, decree and declare the law as hereinafter stated;

Now, therefore, the Court doth order, that the order heretofore entered herein overruling the demurrer of plaintiff to defendant's answer and the judgment and decree thereupon rendered and entered herein be, and they hereby are, vacated and set aside, and the said demurrer of plaintiff to defendant's answer be, and hereby is, sustained; and

It is Decreed, Declared and Adjudged:

1. That the services performed by the defendant Bank in operating safety deposit boxes and vaults, as described in the pleadings herein, are not exempt from taxation under

the said Service Tax Act of Colorado; that the said services are taxable pursuant to the terms of the said Act and within the provision of the said Act governing depositories, and are within the said paragraphs or sections numbered 10 and 27 of the said rules, regulations and interpretations, and they, as well as the said Act, relating to the said depository services, are proper and valid, in all respects, as to the duties, burdens, responsibilities, liabilities, fines and penalties imposed upon the Bank, in performing the said depository services, to collect and account for, and to pay the said tax.

Done in open court this 12th day of September, 1939.

By the Court:

ROBERT W. STEELE,
Judge.

EXHIBIT "F".

Objections and Exceptions of the Defendant to the Second Declaratory Judgment and Decree and Assignments of Error in Second Cause in Colorado Supreme Court.

The Colorado National Bank of Denver, defendant above named, by its attorneys, objects to the entry of the presented judgment and decree for the following reasons, to-wit:

I.

That by said judgment and decree the Court will decide this cause in favor of the validity of the Colorado Public Revenue Service Tax Act when, in law, the said Act is repugnant to the Constitution and laws of the United States insofar as the said Act affects the defendant Bank.

II.

That it will deny to the defendant Bank rights, privileges and immunities specially set up in the answer of the defendant Bank and in its arguments, and claimed by it under the Constitution, statutes of, and authority exercised under, the United States.

III.

That the said judgment and decree, and the findings and conclusions therein made, are contrary to the law, and to the material facts pleaded and admitted by the said demurrer, in each and all of the following particulars, to-wit:

(1) In holding that the defendant Bank's operation of its safety deposit vaults, as described in its answer, and admitted by the said demurrer, is "aside from and outside its regular business" as a national bank.

(2) In holding that the said services performed by the defendant Bank are not within the exemption of Section 7 of the said Act, providing that "all services rendered or formed which the State of Colorado is prohibited from taxing under the Constitution or the laws of the United States * * * shall be exempt from taxation under this Act."

(3) In holding that the said Act does not violate the Acts of Congress of the United States, and particularly U. S. R. S., Sec. 5219, as amended (U. S. C. A. Title 12, Sec. 548).

(4) In determining and holding that the tax on the defendant Bank's depository services is imposed on the user of the said services, and not on the defendant Bank, and, notwithstanding this, in further determining and holding that the Bank is responsible or liable for the said tax on its said services, whether or not it collects the amount thereof from the users of its said services.

(5) In holding that the said Act, in requiring the defendant Bank to collect the said tax on its said services, and, whether or not collected, to pay the same to the State Treasurer, and otherwise to be subjected to all burdens, liabilities, fines and penalties provided in the said Act, does not impose an unconstitutional or unlawful burden upon or interference with the defendant Bank as a Governmental Agency or instrumentality.

(6) In holding that Section 10 of the rules, regulations and interpretations recited in the said decree is proper and valid.

(7) In holding that Section 27 of the rules, regulations and interpretations recited in the said decree is proper and valid.

(8) In holding that the plaintiff Treasurer need not apply the said Act so as to exempt the defendant Bank, as a Federal Agency or instrumentality, from the said tax, when, as shown by his other rulings, regulations and interpretations of the said Act, he so applies it as to exempt all other Federal Agencies and instrumentalities from the said tax; and in this respect his said application of the said Act amounts to an unlawful discrimination repugnant to the Fourteenth Amendment of the Constitution of the United States, and also to the Constitution of the State of Colorado.

(9) In holding that the said Act may, without the acquiescence or consent of the defendant Bank, conscript it as an agent of the state to collect and remit the said tax on any part of its banking services, or else to be subjected to the burdens, liabilities, fines and penalties which the Act imposes.

IV.

That the said judgment and decree, if entered, will result in a decision repugnant to the Acts of Congress, relating to national banks, adopted pursuant to the Governmental powers conferred upon the Congress by the United States Constitution, and particularly Article I, Section 8, thereof.

V.

That the said judgment and decree, if entered, will result in a decision repugnant to each and all of the following Constitutional provisions (national and state) to-wit:

From the United States Constitution and Amendments:

Art. I, Sec. 10. "No state shall • • • pass any law impairing the obligation of contracts."

Art. V of Amendments. "No person shall be • • • deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

Art. XIII, Sec. 1, of Amendments. "Neither slavery nor involuntary servitude, except as punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States."

Art. XIV, Sec. 1, of Amendments. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law."

From the Colorado Constitution:

Art. II, Sec. 15. "Private property shall not be taken * * * for public or private use without just compensation."

Art. II, Sec. 25. "No person shall be deprived of life, liberty or property without due process of law."

Art. II, Sec. 26. "There shall never be in this state * * * involuntary servitude except as punishment for a crime, whereof the party shall have been duly convicted."

Art. XII, Sec. 2. "No person shall hold any * * * employment of trust * * * under the laws of the State * * * without devoting his personal attention to the duties of the same."

EXHIBIT "G".

Colorado Supreme Court Decision of January 8, 1940.

The issues presented in this case are in all respects identical with those raised in Bedford, State Treasurer v. Colorado National Bank, 104 Colo. 311 (91 P. (2d) 469), in which our holding was adverse to the contentions advanced by plaintiff in error bank. Consistently with our conclusions therein announced, the judgment here under consideration is affirmed.

Mr. Justice Francis E. Bouck not participating.